RESPONSE TO "MOTION TO REJECT PROBATION FOR 'PROPOSITION 200' CASE"

A.R.S. § 13-901.01 affirmatively requires the court to place Proposition 200 defendants on probation. A defendant should not be allowed to reject probation when incarceration is not available as an alternative. If the court does allow a defendant to reject probation, logically the court should be able to sentence the defendant to prison instead. If the court holds that the defendant can reject probation without any consequences, the State should be allowed to withdraw from the plea.

The State of Arizona, through undersigned counsel, opposes the motion, for the reasons set forth in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts

The State agrees with the facts as set forth in the defendant's motion.

II. Argument

A. Because probation is mandatory under A.R.S. § 13-901.01, the defendant cannot be allowed to reject probation. If, however, the defendant is allowed to reject the mandatory probation under that statute, this Court should imprison him for his drug offenses.

A.R.S. § 13-901.01(A) provides:

> § 13-901.01. Probation for persons convicted of personal possession and use of controlled substances; treatment; prevention; education
>
> A. Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance as defined in § 36-2501 is eligible for probation. **The court shall** suspend the imposition or execution of sentence and **place such person on probation.**

[Emphasis added.]

When courts construe a statute, the primary goal is "to fulfill the intent of the legislature that wrote it." *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). Courts always look first to the language of the statute because the statute's language is "the best and most reliable index of a statute's meaning." *Id*., quoting *Janson v.*

Christensen, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). If a statute's language is clear and unambiguous, the courts must give effect to that language and may not employ other rules of statutory construction. *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997). The courts study the language of an initiative proposition, to ascertain the electorate's intent underlying the initiative, in construing a statute enacted in response to an initiative. *State v. Thomas*, 196 Ariz. 312, 314 ¶ 7, 996 P.2d 113, 115 (App. 1999).

Use of the word "shall" in a statute ordinarily indicates that the provision is mandatory. "The ordinary meaning of the word 'shall,' in the context of a statute, is to impose a mandatory duty. The use of the word 'shall' indicates a mandatory intent." *Appeal in Navajo County Juvenile Action No. JV-94000086*, 182 Ariz. 568, 570, 898 P.2d 517, 519 (App. 1995); see also *State ex rel. Romley v. Superior Court*, 185 Ariz. 160, 164, 913 P.2d 500, 504 (App. 1996). Thus, A.R.S. § 13-901.01(A) requires the court to place Proposition 200 defendants on probation.

Case law has recognized that one of the stated purposes of Proposition 200 was to "require that non-violent persons convicted of personal possession or use of drugs successfully undergo court-supervised mandatory drug treatment programs and probation." *State v. Estrada*, 197 Ariz. 383, 385 ¶ 7, 4 P.3d 438, 440 (App. 2000). The framers of Proposition 200 "urged that funds freed by diverting nonviolent possessors from prison could be better used for other purposes" such as anti-drug education. *State v. Pereyra*, 199 Ariz. 352, 355 ¶ 10 (340 Ariz. Adv. Rep. 5), 18 P.3d 146, 149 (App. 2001). As the Court of Appeals stated in *Mejia v. Irwin*, 195 Ariz. 270, 271 ¶ 9, 987 P.2d 756, 757 (App. 1999):

> In 1996, Arizona voters passed, and in 1998 they reaffirmed, a statutory scheme that required alternatives to incarceration -- such as treatment, education, and community service -- for those convicted for the first time of possession or use of dangerous drugs.

After Proposition 200 passed, the legislature recognized that the voters wanted first and second drug possession offenders to receive treatment rather than imprisonment. Accordingly, the legislature promulgated A.R.S. § 13-901.01(A), mandating that upon such convictions, the trial court must impose probation and must order the defendant to participate in a drug treatment or education program. *Calik v. Kongable*, 195 Ariz. 496, 499 ¶ 12, 990 P.2d 1055, 1058 (1999).

It is important to remember that the statute **requires** that such defendants receive probation and treatment, rather than incarceration. In other words, the statute does not simply bar the court from incarcerating such defendants, but rather affirmatively mandates that the trial court place such defendants on probation and order them into treatment. The terms of the mandatory probation under A.R.S. § 13-901.01 must require the defendants to "successfully undergo court-supervised mandatory drug treatment programs and probation." *Estrada*, 197 Ariz. at 385 ¶ 7, 4 P.3d at 440.

As the Arizona Supreme Court said in *Calik*, *supra* at 501 ¶ 19, 990 P.2d at 1060, the goal of Proposition 200 was "to treat initial convictions for personal possession and use of a controlled substance as a medical and social problem." The Proposition was passed with the intent to place such offenders on probation and treat their drug problems "through court-supervised drug treatment and education programs." The *Calik* Court noted that the publicity pamphlet for Proposition 200 stated that a person on probation "is under the supervision of a probation officer," and stated that "the

electorate was entitled to rely on [the description in the publicity pamphlet] of the intent or effect of the initiative proposal." *Id*. at 500 ¶ 18, 990 P.2d at 1050.

The defendant here argues:

> The punishment for a "Proposition 200" eligible defendant who fails to take advantage of the available supervision and help is the prison term available if he relapses into drug use again.

The State is not certain what the defense means by this argument, but he appears to be arguing that he should not suffer any consequences from his current drug convictions; rather, he argues that he should remain free and unsupervised unless and until he commits new crimes. But the defendant fails to recognize that the voters who passed Proposition 200 did not intend to remove all consequences from a defendant's first two drug possession convictions -- instead, the electors believed that the law would be changed to require probation and treatment rather than incarceration for such convictions. The voters were entitled to rely on the statement in the publicity pamphlet, which assured them that people convicted of first and second drug offenses would be supervised by probation officers and required to undergo treatment -- not that such offenders could ignore treatment with impunity and reject probation without any consequences.

It is true that, outside of the Proposition 200 context, a defendant may reject probation entirely and choose instead to go to prison. As the Arizona Supreme Court said in *State v. Montgomery*, 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977), "The defendant, of course, may reject the terms of probation **and ask to be incarcerated instead** if he finds the terms and conditions of his probation unduly harsh." [Emphasis added.] See also *State v. Harris*, 122 Ariz. 593, 594, 596 P.2d 731, 732 (App. 1979).

However, defendants have never been allowed to reject probation in favor of “walking away” from their convictions without any consequences.

The Arizona appellate courts have not yet specifically considered whether a defendant may reject mandatory probation under Proposition 200/A.R.S. § 13-901.01 when prison is not an option. If a defendant may reject probation under Proposition 200, the appellate courts have not decided what the consequences of such a rejection would be. A.R.S. § 13-901.01 does not address the issue of whether a Proposition 200 defendant may reject probation. Logically, though, the State submits that because the stated purpose of Proposition 200 is to provide treatment and education rather than incarceration for first- and second-time drug possession offenders, a Proposition 200 defendant should not be able to reject that probation, treatment, and education.

To put it another way, Proposition 200 provides a right/benefit for first- and second-time offenders, but also imposes a duty/burden. The benefit is that such offenders cannot be incarcerated for their crimes, but the burden is that they must receive treatment and education instead. Thus, Proposition 200 defendants should not be allowed to reject probation; all such defendants should be placed on probation and ordered to take part in a treatment/education program.

Nevertheless, if a defendant is allowed to reject Proposition 200 probation and the accompanying treatment, he should not be allowed to obtain the benefits of Proposition 200 without accepting its burdens. Thus, if the defendant is allowed to reject probation under Proposition 200, this Court should be able to incarcerate him for his drug offenses. In other words, if the defendant can reject the burden of Proposition 200,

he will thereby waive the benefit of Proposition 200, and this Court should impose a prison sentence on the defendant for his drug convictions.

A defendant may always make a knowing, voluntary, and intelligent waiver of any statutory and constitutional rights that exist for his benefit. *State v. Graninger*, 96 Ariz. 172, 174, 393 P.2d 266, 268 (1964) [waiver of preliminary hearing]; *State v. Smith*, 197 Ariz. 333, 338, 4 P.3d 388, 393 (App. 1999) [waiver of right to a twelve-person jury]; *State v. Reed*, 196 Ariz. 37, 38, 992 P.2d 1132, 1133 (App. 1999) [waiver of right to be present at trial]; *State v. Carter*, 151 Ariz. 532, 534, 729 P.2d 336, 338 (App. 1986) [waiver of speedy trial right under Interstate Agreement on Detainers]; *State v. Greer*, 7 Ariz. App. 155, 156, 436 P.2d 933, 934 (App. 1968) [waiver of right to speedy trial]. Accordingly, because the right to avoid imprisonment under Proposition 200 exists for the defendant's benefit, he should be able to waive that right. Therefore, if the defendant may reject Proposition 200 probation, this Court should be able to imprison him for his drug offenses, and the State asks this Court to do so.

B. If this Court rules that the defendant may reject probation without any consequences, the State asks this Court to allow the State the opportunity to withdraw from the plea agreement.

The parties here entered into a plea agreement in which they agreed that probation was mandatory for this defendant's drug offenses. This Court imposed a prison term for the defendant's forgery case and placed the defendant on probation for his drug offenses following his prison term. Because of the defendant's probation term following his prison term in the forgery case, this Court waived the community supervision in the forgery case even though community supervision is normally required after a prison term. See A.R.S. § 13-603 (I), (K).

Even though the defendant agreed to probation, and even though all the parties believed at the time of the plea agreement that probation was mandatory, the defendant now asks to "unilaterally reject probation." As argued above, the State believes that defendants sentenced under A.R.S. § 13-901.01 should not be allowed to reject probation because probation is mandatory under that statute. In the alternative, if the defendant is allowed to reject probation, the State believes that rejecting probation would constitute a waiver of the probation otherwise available by statute; therefore, this Court should be allowed to sentence the defendant to prison for his drug offenses.

However, if this Court rules that the defendant may reject the probation term he agreed to, without suffering any consequences from doing so, the State asks the opportunity to withdraw from the plea agreement because there has been no "meeting of the minds." When the parties have stipulated to a sentence, the trial court may reject the stipulated sentence and allow the parties to withdraw from the plea agreement, but the court may not impose a sentence contrary to the plea agreement. *Mejia v. Irwin*, 195 Ariz. 270, 272 ¶ 12, 987 P.2d 756, 758 (App. 1999). The State may withdraw from a plea agreement when the trial court rejects a sentencing stipulation. *State v. Corno*, 179 Ariz. 151, 153, 876 P.2d 1186, 189 (App. 1994). "Unless the plea agreement specifically gives the court discretion to do otherwise, the court may not vary the terms of the plea agreement without consent of the parties. There is no authority for the court to impose a sentence contrary to the plea agreement." *State v. Oatley*, 174 Ariz. 124, 125-26, 847 P.2d 625, 626-27 (App. 1993).

In this case, the State relied on the fact that the defendant would receive probation in extending its plea offer, and this Court relied on the defendant's being on

probation after his prison term in deciding to waive the community supervision requirement in the forgery case. If the defendant is allowed to unilaterally reject probation, he will receive a windfall that the State never offered and that he never bargained for. In addition, this Court's sentencing decision will be undermined.

III. Conclusion

For the reasons set forth in this Response, the State asks this Court to rule that the defendant cannot reject probation under A.R.S. § 13-901.01, or, in the alternative, that if he does reject probation this Court can sentence him to a prison term for his drug offenses. If this Court rules that the defendant can reject probation and cannot go to prison for his drug offenses, the State asks this Court to allow the State to withdraw from the plea agreement.